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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

In re I. N. et al., Persons Coming Under the Juvenile
Court Law.

C072216

EL DORADO COUNTY DEPARTMENT OF
HUMAN SERVICES,

(Super. Ct. Nos.
SDP20090044,
SDP20090045)

Plaintiff and Respondent,

v.

A. C.,

Defendant and Appellant;

I. N. et al.,

Appellants.

The minors I.N. and E.N. and their mother A.C. appeal from the juvenile court's orders terminating parental rights. (Welf. & Inst. Code, §§ 395, 366.26.)¹

¹ Undesignated statutory references are to the Welfare and Institutions Code.

They contend the juvenile court erred in failing to apply the beneficial parent/child relationship exception to adoption. In addition, the minors contend the juvenile court deprived them of due process by failing to inquire into a potential conflict of interest involving their trial counsel. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant A.C. (mother) and B.N. (father) are the parents of twins, the minors I.N. and E.N. (born spring 2005).² In September 2009 the El Dorado County Department of Human Services (DHS) filed nondetained dependency petitions (§ 300) alleging mother's boyfriend, J.B., had broken her jaw, and mother had admitted recently smoking marijuana in spite of a prior referral for substance abuse services.

The police officer responding to the domestic violence call noted mother “ ‘had watery, bloodshot eyes, and a strong odor of an alcoholic beverage about her breath and person.’ ” The officer confiscated 4.8 grams of marijuana, which mother claimed was her boyfriend's. Mother obtained a temporary restraining order against the boyfriend and was instructed by a social worker on the importance of keeping him from her home. She subsequently allowed the boyfriend back into her home.

Mother denied smoking marijuana in front of her children but admitted that she would most likely test positive for marijuana. At the time she claimed she used marijuana only sporadically and was not addicted.

According to the September 2009 jurisdiction/disposition report, mother had a strong relationship with the minors and clearly loved them. The minors remained with mother because she had not placed them in imminent danger. However, mother delayed setting up her drug testing services, stalled her first test, and smoked marijuana the next day.

² Father is not a party to this appeal.

At the September 30, 2009, jurisdiction/disposition hearing, the juvenile court sustained the petitions; placed the minors with the parents, who shared custody; and ordered services for mother.

DHS filed supplemental petitions (§ 387) in October 2009, alleging mother drove the minors to daycare while under the influence of alcohol. According to the detention report, mother tested positive for marijuana on October 2, 7, and 12, 2009; two of those test results indicated recent or habitual use. The social worker confronted mother, who admitted having a more severe problem with marijuana than she initially thought but claimed to have abstained from alcohol since the domestic violence incident in August 2009. Less than 48 hours after the conversation, mother tested positive for alcohol and marijuana. Mother submitted the test at 10:00 a.m. and had a blood-alcohol level of 0.24 percent. At 10:40 she signed the children in at daycare. The minors were removed from mother and placed with father. Mother subsequently admitted consuming six vodka cocktails between 8:30 p.m. and 2:00 a.m. on the night before the test.

The December 2009 jurisdiction/disposition report noted that mother had recently told a social worker, “ ‘I screwed up big time, and I obviously needed help.’ ” Mother’s substance abuse provider indicated she was “ ‘totally engaged now.’ ”

The minors were safe in father’s home, but father twice tested positive for marijuana and often argued with his girlfriend in front of the minors. Mother consistently visited the minors; according to the social worker, she was “great” with her children.

The minors’ court appointed special advocate (CASA) filed a report in December 2009. She noted the minors were happy to see mother on visits, and mother appeared to miss and love her children very much.

In December 2009 the juvenile court sustained the supplemental petition, removed custody from mother, continued services for mother, and ordered services for father. Mother’s visitation was increased to twice a week for a total of six hours.

In April 2010 DHS filed petitions alleging father failed to protect the minors by allowing an ex-girlfriend with a history of heroin use to spend several nights at his home, and by engaging in numerous verbal altercations with mother in front of the minors.³ The April 2010 detention report noted the minors were placed with the maternal grandmother, who had been approved for placement. The minors were returned to mother at the detention hearing held later that month.

According to the May 2010 jurisdiction/disposition report, father was uncooperative and would not keep a verbal safety plan. Mother had completed 90 days of inpatient treatment and complied with dependency drug court. After the minors were returned to her care, mother demonstrated good parenting and was benefitting from services.

At the May 2010 jurisdiction hearing, the juvenile court sustained the supplemental petitions and placed the minors with mother. The juvenile court ordered family maintenance services for mother and reunification services for father at the June 2010 disposition hearing.

In July 2010 father was discharged from drug treatment for taking another patient's OxyContin. He then got together with mother and encouraged her to use methamphetamine and alcohol. Mother relapsed but immediately reported the incident and requested a return to inpatient treatment; the decision was made to treat her on an outpatient basis. She showed signs of continued progress after her relapse, and the minors were doing well in her home.

In November 2010 DHS filed supplemental petitions (§ 387) alleging mother had allowed ex-boyfriend J.B. back into her home and lied about it to DHS personnel.

³ The petitions were erroneously filed pursuant to section 300; the minute order for the detention hearing noted this and stated amended petitions would be filed correctly as section 342 subsequent petitions.

Mother and J.B. arranged for J.B. to use a false name with social workers when they found him in mother's home. The minors were detained and placed with the maternal grandmother at the November 2010 detention hearing. DHS filed a request in December 2010 to remove the minors from the maternal grandmother after she took the minors to visit father in Reno contrary to the juvenile court's orders.

The December 2010 jurisdiction/disposition report recommended terminating services for both parents and setting a section 366.26 hearing. In a November 2010 interview with the social worker and mother's therapist, mother disclosed to the social worker a fact she professed to have earlier reported to her therapist: that she was seeing J.B. and father concurrently while she participated in services. However, the therapist stated that mother did not say she was seeing J.B. and claimed only that she had a new boyfriend. Mother told the social worker the dependency case was without merit and hurt the children. She also stated: “ ‘the next time I get hit I won't call the police.’ ” (Italics omitted.)

The juvenile court sustained the supplemental petitions at the December 2010 jurisdiction hearing. At the disposition hearing held later that month, the juvenile court ordered reunification services for mother, denied reunification services for father, and continued placement with the maternal grandmother.

In February 2011 DHS filed supplemental petitions (§ 387) after the minors were removed from the maternal grandmother's home following the revocation of her daycare license. The grandmother had allowed mother continuous access to the minors in violation of the juvenile court's orders, and the department could not complete a relative assessment because she would not cooperate with DHS personnel. The February 2011 detention report stated the minors were currently visiting the paternal grandmother in Reno, Nevada. The report noted that the maternal grandmother was making the social worker “an object of fear for the children.”

The juvenile court placed the minors with mother and continued family maintenance for her in February 2011.

DHS filed subsequent petitions (§ 342) in May 2011, alleging mother drank alcohol and allowed father to spend the night at her home. The May 2011 detention report noted that the minors were placed in foster care. Mother admitted there had been domestic violence with father but that it was of a different type than the domestic violence with J.B. that initiated the dependency.

DHS filed the petitions after the director of mother's counseling center reported that mother told her therapist she drank a bottle of alcohol, went to a bar, and " 'shut down the bar' " after being sexually harassed at work. The therapist, who was also the minors' therapist, did not feel comfortable having the minors live with mother. The therapist thought mother had a pattern in which she complied with services and then had an incident for which she did not take responsibility. She concluded that mother had not made the internal changes consistent with the services offered.

A report noted mother was confrontational with the police when the minors were detained. The minors were in another room crying when mother confronted the police. When a services aide went to talk to the minors, mother told them not to talk to him as he was one of the social worker's " 'spies' " and played for the social worker's " 'team.' "

The minors were returned to mother following a contested detention hearing in May 2011. The juvenile court found the therapist's statements were inadmissible as they violated mother's therapist-client privilege.

A May 2011 CASA report stated that the minors were doing well in mother's care but were suspicious of authority figures. It seemed as if the minors thought someone could show up at any time and move them to a new placement. According to the advocate, another detention from mother's care would "be devastating and increasingly traumatic on them."

The section 342 petitions were considered at a June 2011 contested jurisdiction hearing. The juvenile court did not sustain the allegations and dismissed the petitions.

In July 2011 DHS filed ex parte applications for inpatient drug treatment and a psychological evaluation of mother after she admitted that a substance abuse test would be positive for marijuana and alcohol. Mother also admitted several months of falsified drug tests. The juvenile court granted DHS's request and continued family maintenance services at a review hearing in August 2011.

DHS filed supplemental petitions in September 2011, alleging mother relapsed by drinking alcohol with a golfing companion. She had received over 24 months of services, and her psychological evaluation stated she might only marginally benefit from services. The psychological evaluation attached to the December 2011 detention report diagnosed mother with cannabis abuse, alcohol abuse, and personality disorder not otherwise specified with narcissistic, antisocial, and paranoid personality traits. The psychologist concluded mother had not benefitted from counseling and possibly could benefit only from long-term psychotherapy.

The juvenile court detained the minors in an October 2011 detention hearing.

The CASA reported the minors, now living in Sparks, Nevada, with their paternal grandmother, were in their third school placement in just over a year. They were not unhappy about leaving their prior residence or going to a new school. Mother told the minors that her drinking was the cause of all their problems and that they might have to live with their grandmother forever.

The October 2011 jurisdiction/disposition report noted that the minors were visiting their paternal grandmother and would be placed in foster care if Nevada declined the Interstate Compact on Placement of Children (ICPC) request for placement with the paternal grandmother. DHS again recommended terminating mother's services and setting a section 366.26 hearing.

The juvenile court sustained the petitions and continued removal from mother at the October 2011 jurisdiction hearing. Reunification services were terminated and a section 366.26 hearing was set at the November 2011 disposition hearing.

ICPC placement was granted with the paternal grandmother in March 2012. The minors were thriving in the paternal grandmother's care, and she was "100% committed to adopting them." According to the paternal grandmother, the minors would like to be with mother, but if adopted, they would prefer to be adopted by her. She related that I.N. " 'thinks that adoption means they would stay with whoever adopted them forever,' " while E.N. " 'thinks adoption means taking somebody's kid.' "

The March 2012 CASA report recommended guardianship rather than adoption. According to the advocate, bonding between mother and the minors was the issue: termination of parental rights "could have a potential negative emotional impact on the children." The advocate felt that the minors did not understand the ramifications of adoption, and that it might prevent them from seeing mother when they wanted to.

In March 2012 a therapist evaluated the minors to determine whether adoption would psychologically harm them. After meeting with the minors for an hour, the evaluator found they did not have a particularly strong bond with either parent or the grandparents, and their strongest bond was with each other. The therapist also noted it was "extremely difficult to give a recommendation like this after spending only one hour with the children and never meeting either parent." Later that month, the juvenile court designated a psychologist to conduct a bonding study.

The bonding study was filed in August 2012. According to the minors, mother told them that she cries for them every night and wants them to live with her. Both minors said mother did not like the paternal grandmother. The psychologist found it "concerning that the mother has shared her sadness at being separated from the children with them directly." Telling the minors that she cried over them every night was "not appropriate." The minors were attached to mother, but one of the reasons they wanted to

live with her was “because they want their mother to feel better.” The psychologist noted the minors expressed no desire to change their living conditions when asked by their therapist in March 2012; it was possible mother did not begin lobbying the minors until after becoming aware of their stated lack of preference.

The psychologist concluded the minors should remain together, and they were bonded to both parents and both grandparents. It would not be in the minors’ best interests to lose their relationship with any of the parents or grandparents.

An August 2012 addendum report by DHS noted the minors continued to thrive with the paternal grandmother. Mother was arrested that month for driving under the influence of alcohol.

A September 2012 report stated the minors were bonded with the paternal grandmother and severing parental rights was in the minors’ best interests. DHS recommended a permanent plan of adoption.

At the September 2012 section 366.26 hearing, the parties stipulated the minors were adoptable; the only issue was whether the beneficial parent/child relationship exception applied.

Mother testified that when she picked up the children they would run full speed at her, hold her hands, and not let go. I.N. got upset at the end of visits; he did not want to leave mother or his house and hated going back to the paternal grandmother’s house. E.N. was ecstatic to see her and cried very hard at the end of visits. The minors did not want to be adopted, and E.N. raised the subject every time the children and mother were together.

Mother and the minors prayed about each other. I.N. was comfortable expressing anger with her; the minors listened to her advice on how to deal with anger. According to mother, it was apparent the minors had an “amazing bond” with her and loved her “more than anything.”

The maternal grandmother testified that the minors loved the mother—running to her, hugging her, and very happy to see her on visits.

The CASA had worked on the case 10 to 12 hours per month since 2009. The minors had a very good relationship with mother and were always happy with her. They always wanted to know how many hours of the visit with mother were left, and where they would go with her for the next weekend’s visit. The advocate recommended guardianship because she was afraid that the minors would not have a relationship with mother if they were adopted. In light of the close bond with mother, it would be a “disaster” not to have that relationship.

Minors’ counsel argued for guardianship, asserting the minors would be “absolutely devastated” if parental rights were terminated.

The juvenile court found the beneficial parent/child relationship exception to adoption did not apply and terminated parental rights.

DISCUSSION

I

Mother and the minors contend the juvenile court erred in failing to apply the beneficial parent/child exception to adoption. We disagree.

At a hearing under section 366.26, if the juvenile court finds by clear and convincing evidence that a minor is likely to be adopted, the court must terminate parental rights and order the minor placed for adoption unless “[t]he court finds a compelling reason for determining that termination would be detrimental” due to one of the statutorily enumerated exceptions. (§ 366.26, subd. (c)(1)(B).)

The parent has the burden of establishing an exception to termination of parental rights. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.) “Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child’s needs, it is only in an extraordinary case that preservation of the parent’s rights

will prevail over the Legislature’s preference for adoptive placement.” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350 (*Jasmine D.*).)

When the juvenile court rejects an exception to adoption, we review the court’s finding deferentially. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315 [whether standard of review deemed substantial evidence or abuse of discretion, broad deference to lower court required]; *Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351 [abuse of discretion]; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576 (*Autumn H.*) [substantial evidence].)

Section 366.26, subdivision (c)(1)(B)(i) provides an exception to adoption when “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” However, a parent may not claim this exception “simply by demonstrating some benefit to the child from a continued relationship with the parent, or some detriment from termination of parental rights.” (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1349.) The benefit to the child must promote “the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.” (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

Mother’s consistent visitation was not at issue in the juvenile court; the only issue was whether maintaining the child/parent bonds outweighed the minors’ interest in gaining a permanent home through adoption. In support of their contention, mother and the minors identify evidence of the strength of the minors’ bond with mother—the bonding study found mother and the minors were bonded and losing that relationship was not in the minors’ best interests; the CASA recommended guardianship in light of what

she saw as a very close bond between mother and the minors; and the social worker acknowledged the bond between mother and the minors.

The problem with appellants' argument is that a bond between parent and child by itself is not sufficient to carry the parent's burden of establishing the exception to adoption. While every minor has an interest in having a permanent placement by the time of the section 366.26 hearing, the minors' interest in permanency was particularly strong in this case.

The juvenile court was extremely lenient with mother, continuing services after her repeated relapses and in spite of her history of deceiving DHS personnel. This led to a prolonged dependency lasting three years, as well as numerous changes in the minors' residences. The minors were in mother's custody from the onset of the dependency, September 3, 2009, until they were removed from her custody and placed with father in October 2009. In April 2010 the minors were removed from father's care and placed first with the maternal grandmother and then with mother. The minors were then removed from mother and placed with the maternal grandmother in November 2010. They were returned to mother yet again in February 2011. In July and August 2011 the minors spent a month with the paternal grandmother after mother admitted falsifying her substance abuse specimens. They lived with mother in a residence treatment facility from August 2011 until their removal and placement with the paternal grandmother in September 2011.

Shuffling the minors between households took a toll on them. The May 2011 CASA report noted the minors "are never sure of who may show up at any given time to take them away and move them to new placement." Even though the advocate thought that further detention from mother's care would "be devastating and increasingly traumatic on them," the minors were moved three more times after the report. In light of

the numerous changes in the minors' residences, it is no surprise that I.N. said during the bonding study that he does not know which house is really his home.⁴

While the minors clearly loved mother and enjoyed visits with her, the record does not show that separation from her harmed them.⁵ The record does not show that the minors acted out when separated from mother or when visits were diminished. The minors thrived after their last removal from mother and placement with the paternal grandmother. Before mother started lobbying the minors, they expressed no preference as to where they lived.

Mother's relationship with the minors was not always beneficial to them. She has attempted to manipulate them to further her own interests in the dependency—telling the minors not to talk to a DHS employee who was one of the social worker's “ ‘spies’ ” and was a member of the other “ ‘team,’ ” and telling the minors she cried at night and wanted them to live with her after the minors expressed no preference as to where they would live. Mother's attempts to use her children in the dependency action support a conclusion that she would continue to do so under a guardianship where the guardian, the paternal grandmother, is a person she dislikes.

The cases cited by appellants do not support reversal. The minors rely primarily on *In re Angel B.* (2002) 97 Cal.App.4th 454, which finds four factors to consider when determining whether a parent/child relationship benefits the minor: “(1) the age of the child, (2) the portion of the child's life spent in the parent's custody, (3) the positive or negative effect of interaction between the parent and the child, and (4) the child's

⁴ The CASA also testified that she thought the minors were behind in their schoolwork because of “these three years of instability that they've had to endure.”

⁵ The juvenile court did not have to credit mother's self-serving statement that at the end of visits I.N. said he hated going back to the paternal grandmother's. That statement has no other support in the record, is inconsistent with the CASA's testimony, and the minors have thrived in the paternal grandmother's care.

particular needs. [Citation.]” (*Id.* at p. 467, fn. omitted.) The minors’ relative youth—they were a little over four years old when the dependency started and a little over seven at the section 366.26 hearing—lessens the importance of the bond. While the minors spent roughly three-quarters of their young lives with mother, the 25 percent away from her was still a substantial portion of their lives. As previously noted, mother’s interactions with the minors were both positive and negative. And as to the fourth factor, the minors’ special needs for stability weigh heavily against continuing the parent/child relationship. *Angel B.* does not help appellants.

The cases primarily relied on by mother, *In re Amber M.* (2002) 103 Cal.App.4th 681 and *In re S.B.* (2008) 164 Cal.App.4th 289, are no more helpful to appellants’ case. Unlike the relevant parents in *Amber M.* and *S.B.*, mother did not do “virtually all that was asked of her to regain custody” (*Amber M.*, at p. 690) and far from “ ‘complied with every aspect of [her] case plan’ ” (*S.B.*, at p. 293). In addition, neither case involved such a prolonged dependency causing great instability in the minors’ lives. (See *Amber M.*, at pp. 685-686 [two-year dependency, one placement for two of the three minors, two placements for the other]; *S.B.*, at pp. 293-296 [23-month dependency, one placement].)

In light of the minors’ particular need for permanence, the negative aspects of the bond, and the relative lack of harm caused to the minors by separation from mother, appellants did not meet their burden of demonstrating this was an extraordinary case requiring application of the beneficial parent/child bond exception to adoption.

II

The minors contend the juvenile court deprived them of their due process rights by failing to consider whether their trial counsel had a conflict of interest.

Although DHS has failed to respond to the minors’ contentions, that failure “ ‘does not require an automatic reversal. . . . [T]he better rule is to examine the record and reverse only if prejudicial error is found.’ [Citation.]” (*Estate of Cibulk* (1998) 67 Cal.App.4th 690, 691, fn. 1.)

In a June 2011 addendum report, the social worker stated the minors' counsel said "he was intending to undertake representation of the mother in this case in a lawsuit against the children's and mother's therapist." A July 2011 ex parte application from DHS stated that mother, while arguing with a social worker about drug testing, "called her attorney and the attorney for the children who also is representing her in a claim against the county."

Admitting the record does not establish that minors' trial counsel in fact represented mother in an action against the county, the minors argue that the juvenile court erred in failing to inquire into this *potential* conflict of interest.

A minor has a statutory right to the appointment of counsel. (§ 317, subd. (c); *In re Candida S.* (1992) 7 Cal.App.4th 1240, 1252.) Appointed counsel may "not represent another party or county agency whose interests conflict with the child's interests." (§ 317, subd. (c).) While some authority requires only the showing of a potential conflict (*In re Elizabeth M.* (1991) 232 Cal.App.3d 553, 565-568 (*Elizabeth M.*)), the better-reasoned decisions apply the statutory language and require an actual conflict of interest (*In re Richard H.* (1991) 234 Cal.App.3d 1351, 1367-1368 (*Richard H.*); *Candida S.*, *supra*, 7 Cal.App.4th at pp. 1252-1253). Since the record supports no more than the possibility of a conflict, the juvenile court was not required to appoint substitute counsel or inquire into whether an actual conflict existed.⁶

Even if we were willing to find error based on a potential conflict, it would not justify reversal in this case. The standard of review for the failure to appoint separate counsel is whether the record reflects that a miscarriage of justice occurred. (*Richard H.*, *supra*, 234 Cal.App.3d at p. 1370; *Elizabeth M.*, *supra*, 232 Cal.App.3d at p. 568.) Minors' trial counsel advocated the same position at the section 366.26 hearing as

⁶ Of course, a juvenile court may nonetheless conduct such an inquiry when presented with facts such as these.

mother's—the juvenile court should place the minors in guardianship rather than terminate parental rights. Where, as here, the minors and mother had the same position, the mere *possibility* that minors' counsel represented the mother in another action does not constitute a miscarriage of justice warranting reversal.

DISPOSITION

The orders of the juvenile court terminating parental rights are affirmed.

RAYE, P. J.

We concur:

BLEASE, J.

BUTZ, J.